United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

39

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71 - 1170

LONNIE COLEMAN,
a/k/a
WILLIAM COLEMAN,

APPELLANT

vs.

UNITED STATES OF AMERICA,

APPELLEE

On Appeal from the
United States District Court for the District of Columbia

Donald K. Graham

Spencer, Whalen & Graham
2000 Massachusetts Avenue, N. W.
Washington, D. C. 20036

Attorney for Appellant
Appointed by this Court

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No. 71 - 1178

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was there sufficient corroboration of the corpus delecti and of the identification of the complaining witness to meet the burden of proof required in sex crimes?

II. Were the circumstances surrounding the identification of the appellant sufficiently suggestive as to prejudice the appellant and create reversible error?

III. Did the negligent failure by the prosecution to preserve crucial evidence constitute reversible error?

This case has not been previously before this Court.

REFERENCES TO PARTIES AND RULINGS

None

STATEMENT OF THE CASE

On February 11, 1971, the Appellant, Lonnie Coleman, was convicted by a jury in the United States District Court for the District of Columbia of rape and subsequently was sentenced to imprisonment for a term of from four (4) to twelve (12) years.

The testimony at the trial established that on September 3, 1969, Police Officer Larry C. Milton encountered a Miss Victoria Barr at approximately 2:00 o'clock in the morning (Tr. 115). Officer Milton testified that Miss Barr was distraught (Tr. 116). Miss Barr related to Officer Milton that she has been raped (Tr. 115). She was then taken to D. C. General Hospital by one Officer Grainger (Tr. 119) and a medical examination was conducted by Dr. L. B. Martin, Jr. between approximately 3:10 o'clock and 3:20 o'clock that morning. Scrapings from the cervix of Miss Barr revealed that it contained intact sperm. (Tr. 150-O-150-P).

Miss Barr testified that between 6:00 o'clock and 6:30 o'clock in the evening of that same day (September 3, 1969) she recognized her assailant as he was driving past a place where she was then standing. (Tr. 89-90). She stated that she then telephoned the police department and gave them the license number of the car she had seen. Police Officer Boyd B. Bryant testified as to having received this information (Tr. 123-124).

Mr. Coleman was interrogated on October 9, 1969 by Officer McKee as to the ownership of an automobile parked in front of his

residence (Tr. 136-136A, 137A-139A). Testimony was introduced to show that the automobile in possession of Mr. Coleman bore the same license tag number as given to the police by the complaining witness (Tr. 132-133).

On October 12, 1969, Sergeant David P. Weisel showed Miss Barr nine photographs for identification. This set included a picture of Mr. Coleman. An identification was not made at this time (Tr. 141-141A).

On October 13, 1969, Mr. Coleman was arrested (Tr. 139A).

Miss Barr was again shown photographs on October 21, 1969. These were in a book containing 47 photographs of Negro males all thirty-nine years of age or older. Mr. Coleman was 31 years old at the time and his picture was the last in the book. After looking through the book, Miss Barr identified Mr. Coleman as her assailant (Tr. 141A-144). A subsequent identification was made in a line-up conducted on November 6, 1969 (Tr. 143-144A).

Mr. Coleman was subsequently indicted on three counts, rape while armed with a dangerous weapon, rape, and assault with a dangerous weapon. He pleaded not guilty to all counts and trial was held. The jury found him guilty of rape on February 11, 1971, and not guilty on the other two counts.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1178

LONNIE COLEMAN,
a/k/a
WILLIAM COLEMAN

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR THE APPELLANT

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

This is an appeal from a conviction of rape under § 22-2801 of the District of Columbia Code (1967 Edition). Jurisdiction to hear this appeal is founded upon 28 U.S.C. §1291 and Rule 37 of the Federal Rules of Criminal Procedure. The notice of appeal was timely filed.

SUMMARY OF THE ARGUMENT

I. In a prosecution for rape, corroboration of both the corpus delicti and the identification by the complaining witness are mandatory before a triable issue of fact has been raised. In this case there was not a sufficient corroboration of the corpus delicti or of the identification to constitute a triable issue of fact.

A. The evidence and testimony introduced by the prosecution was insufficient to corroborate the corpus delicti.

B. There was not sufficient corroboration of the identification of the appellant to raise a triable issue of fact.

II. The circumstances surrounding the identification of appellant were prejudicial to the appellant and constitute reversible error.

III. The negligent failure to preserve crucial evidence by the prosecution constitutes reversible error.

ARGUMENT

(Appellant believes that a proper understanding of the case would require a reading of the entire transcript, but requests the Court to read at least the following pages: Tr. 80, 89, 90, 104, 114 through 120, 123 through 124, 129, 132, 133, 136, 136-A, 137-A through 139-A, 141 through 144, 144-A, 150-D, 150-O, 150-P and 150-FF)

I. IN A PROSECUTION FOR RAPE, CORROBORATION OF BOTH THE CORPUS DELICTI AND OF THE IDENTIFICATION BY THE COMPLAINING WITNESS ARE MANDATORY BEFORE A TRIABLE ISSUE OF FACT HAS BEEN RAISED. IN THIS CASE THERE WAS NOT A SUFFICIENT CORROBORATION OF THE CORPUS DELICTI OR OF THE IDENTIFICATION TO CONSTITUTE A TRIABLE ISSUE OF FACT.

Among the crimes ennumerated by our criminal laws, rape stands apart due to the nature of the offense and the manner in which a prosecution must be obtained. The nature of the crime is two-fold consisting of the element of sexual intercourse which alone is not a criminal act, and the additional element of force or coercion which is essential to the crime of rape. The prosecution for such an offense likewise gives rise to a special situation in which the complaining witness becomes all important and vital in establishing this second element.

With so much depending upon the complaining witness, the courts early recognized the vast potential for fabrication when the offense of rape is charged. The Court of Appeals of the District of Columbia,

in an attempt to give some safeguards to the innocent who are accused of this offense, as early as 1912 announced the doctrine of corroboration in the case of sex crimes in Kidwell v. United States, 38 App. D.C. 566 (1912). The doctrine contained two parts: there must be corroboration of the corpus delicti, and there must be corroboration of the identification. Consistently this court has upheld that doctrine since it was first stated, and corroboration of both elements in the so-called "sex cases" is today the law.[1]

Under this doctrine, more than a mere question of fact established wholly on the testimony of the complaining witness must be presented before a triable issue of fact has arisen. The government in a prosecution for rape must adequately corroborate the testimony of the complaining witness. There are no set rules or standards to determine when this burden of corroboration has been met. As stated by Judge Tamm in Bailey v. United States, 132 U.S.App.D.C. 82, 405 F.2d 1352 (1968), "There can be no absolute test or concrete guidelines set down as to what constitutes corroboration in a rape case.

[1]Allison v. United States, 133 U.S.App.D.C. 159,409 F.2d 445 (196
Bailey v. United States, 132 U.S.App. D.C.82,405 F.2d 1352 (1968); Boru
v. United States, 133 U.S.App.D.C. 147,409 F.2d 433 (1967) cert. denied
395 U.S. 915,89 S.Ct. 1765,23 L.Ed. 2d 230 (1969); Calhoun v. United St
130 U.S.App.D.C. 266,399 F.2d 999 (1968); Thomas v. United States, 128
U.S.App.D.C. 233, 387 F.2d 191 (1967); Franklin v. United States, 117 U
App.D.C. 331, 330 F.2d 205 (1964); Roberts v. United States, 109 U.S.Ap
D.C. 75,284 F.2d 209 (1960), cert. denied 368 U.S. 863,82 S.Ct. 109,7
L.Ed.2d 60 (1961); Wilson v. United States, 106 U.S.App.D.C. 226,271 F.
492 (1959); Walker v. United States, 96 U.S.App.D.C. 148,223 F.2d 613
(1955); Miller v. United States, 93 U.S.App.D.C. 76,207 F.2d 33 (1953);
Kelly v. United States, 90 U.S.App.D.C. 125,194 F.2d 150 (1952); McGuir
v. United States, 89 U.S.App.D.C. 197,191 F.2d 477 (1951); Ewing v. Uni
States, 77 U.S.App.D.C. 14, 135 F.2d 633 (1942), cert. denied 318 U.S.
776, 63 S.Ct. 829, 87 L.Ed. 1145 (1943).

Each case must be evaluated on its own merits." The appellant contends that at the trial this standard of corroboration was not met, and there remained no issue of fact for determination by the jury.

A. THE EVIDENCE AND TESTIMONY INTRODUCED BY THE PROSECUTION WAS INSUFFICIENT TO CORROBORATE THE CORPUS DELICTI.

(The Court may read pages 114 through 120, 150-D, 150-O, 150-P of the Transcript)

As regards the corpus delicti, the allegations of the complaining witness in the trial below were supported only by weak and inclusive evidence in two areas: (1) testimony by two police officers as to the emotional state of Miss Victoria Barr, the complaining witness; and (2) inclusive medical testimony.

Both Officer Larry C. Milton and Officer Herbert Grainger testified to Miss Barr's emotional state shortly after the alleged assault (Tr. 114-119), indicating that she was upset emotionally. However, the only testimony relating to Miss Barr's physical appearance was given by Officer Grainger. When asked if there was anything unusual about the clothing of Miss Barr, he replied:

A. "It was disarranged slightly. It wasn't to any great extent." (Tr. 120)

The medical evidence introduced can be considered at most only minimal (Tr. 150-O - 150-P). Dr. L. B. Martin performed a gynecological examination on the complaining witness following the alleged rape and his findings were placed in evidence. This examination, performed approximately three hours after the alleged assault, could

not establish that Miss Barr had been the victim of forced sexual intercourse, but merely revealed that scrapings of the cervix showed intact sperm. This served to show that Miss Barr had had sexual intercourse, but that such could have occurred as much as 72 hours prior to the examination. Bearing in mind that Miss Barr testified to having continuous relations with another man (Tr. 150-D) the value of this medical testimony is very questionable.

Since these two meagre areas of testimony and evidence constitute the prosecution's entire attempt at corroboration of the corpus delicti, appellant submits that the record fails to reveal corroboration sufficient to raise a triable issue of fact.

B. THERE WAS NOT SUFFICIENT CORROBORATION OF THE IDENTIFICATION OF THE APPELLANT TO RAISE A TRIABLE ISSUE OF FACT.

(The Court may read pages 80 and 141-A of the Transcript)

On October 12, 1969, the complaining witness was asked to identify her assailant out of a group of nine photographs which included a picture of Mr. Coleman. She was unable to identify him as her assailant at that time (Tr. 80 and 141-A). Although the photograph of Mr. Coleman was several years old, it should be remembered that he had several distinguishing characteristics in his appearance which certainly could not have greatly altered in that time period. This prior lack of identification serves to weaken any subsequent identification made by the complaining witness, and most surely increases the burden of corroboration that the prosecutor must meet.

It is appellant's position that the burden of corroboration as to the identification was not met by the United States.

II. THE CIRCUMSTANCES SURROUNDING IDENTIFICATION OF APPELLANT WERE PREJUDICIAL TO THE APPELLANT AND CONSTITUTE REVERSIBLE ERROR.

(The Court may read pages 141-A through 144 of the Transcript)

The first identification made by Miss Barr was on October 21, 1969, when she was again shown photographs (Tr. 141-A - 144). She was given a book containing 47 photographs. According to the testimony of Sergeant Weisel, the book contained pictures of Negro males of 39 years of age and above (Tr. 142). It is most significant that Mr. Coleman at this time was thirty-one years of age and his picture was the last to appear in the book (picture number forty-seven out of forty-seven). The suggestibility of such a situation is self-evident.

Once such an identification is made, the effect can be far-reaching, regardless of its accuracy. The Supreme Court encountered such a situation in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968), and Mr. Justice Harlan in the majority opinion elaborated upon the inherent problems:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification.

> This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Once Miss Barr identified Mr. Coleman under these circumstances, suggestive of whom she was to identify, this image became impressed in her mind, and the identifications made at the line-up on November 6, 1969, and at the trial were so colored by this as to seriously prejudice the appellant. This prejudice was so great as to constitute reversible error.

III. NEGLIGENT FAILURE TO PRESERVE EVIDENCE BY THE PROSECUTION CONSTITUTES REVERSIBLE ERROR.

(The Court may read pages 104 and 129 of the Transcript)

Crucial evidence in this prosecution for rape, as in any prosecution for rape, is the clothing that the victim was wearing at the time of the alleged crime. Such can be indicative of many things, i.e. a struggle, violence, or consent. Also, as frequently is done, the clothing of the victim can be analyzed for blood stains, semen stains, and other matter which could serve to strengthen or weaken the prosecution's case. The record of the trial below shows that this evidence

was not preserved due to negligence on the part of the investigating officials. (Tr. 129).

Sergeant Bryant who had charge of Miss Barr during the medical examination and until she was released to return to her home testified as follows:

> Q Did you ask Miss Barr for any items of clothing that she was wearing?
>
> A Yes, I did. We were unable to obtain any clothing for her to wear away from the hospital that night. She was instructed to bring the clothing in with her the next day or two when she came in for a statement. (Tr. 129)

Yet when the complaining witness was asked a similar question, she testified differently.

> Q Nobody asked you for your clothing, or suggested that you save it or turn it over, or anything?
>
> A No, they didn't ask me or tell me to bring them in, anything like that. (Tr. 104)

She also testified (Tr. 104) that she threw these clothes away approximately a week after the alleged assault.

This failure to preserve this very vital evidence constitutes gross negligence on the part of the investigative officials. If the testimony of the complaining witness is to be credited as to when the clothing was thrown away, the government had adequate opportunity to obtain this evidence, yet did not.

The situation of evidence being lost due to the negligence of the police became so gross in a recent case that this court issued strong standards that would have to be met in the future. United States v. Bryant, U.S.App.D.C. Nos. 23,957, 24,105, January 29, 1971.

This case involved the loss of a tape which had been in the hands of the government, but was unaccountably "lost" prior to trial. Said Judge Wright,

> Accordingly, we hold that sanctions for nondisclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation. The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse.

The case was then remanded for further proceedings concerning the loss of the tape. However, mention was made of the fact that once such evidence is lost, a new trial often is of no value as the crucial evidence cannot be brought forth.

The appellant urges that this evidence was essential to corroborate the corpus delicti. Strong inferences of innocence might have been deduced from it. It also is clear that the investigating officials had the means as well as the opportunity to preserve this evidenc but did not. Lack of this evidence is so prejudicial to the appellant' case and, under the circumstances, necessary for sufficient corroboration of the charges that reversible error occurred and appellant's motion for acquittal should have been granted.

CONCLUSION

The appellant contends that the motion made for acquittal at the trial should have been granted on any and all of the following

grounds: that there was insufficient corroboration of the allegations of the complaining witness; that the circumstances surrounding the identification of appellant were so suggestive as to substantially prejudice his case; and that the negligent failure of the investigating officials to preserve crucial evidence constitutes grounds for reversible error. For the foregoing reasons, it is submitted that appellant's conviction of rape should be reversed by this Court.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1178

UNITED STATES OF AMERICA, APPELLEE

v.

LONNIE COLEMAN, a/k/a WILLIAM COLEMAN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DANIEL E. TOOMEY,
ROGER M. ADELMAN,
Assistant United States Attorneys.

Cr. No. 2007-69

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was there sufficient corroboration of both the *corpus delicti* of rape and of appellant's identity as the perpetrator?

II. Did the pre-trial identification procedure violate due process?

III. Was the failure of the police to obtain clothing worn by the complainant at the time she was raped by appellant prejudicial to appellant in any way, where credible evidence showed that the clothing was destroyed by the complainant in disobedience of police requests to preserve it and surrender it to them?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1178

UNITED STATES OF AMERICA, APPELLEE

v.

LONNIE COLEMAN, a/k/a WILLIAM COLEMAN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed on December 30, 1969, appellant was charged with rape while armed, rape, and assault with a dangerous weapon, in violation of 22 D.C. Code §§ 2801, 3202 and 502. On December 14 and 15, 1970, he was tried before Judge John H. Pratt and a jury. He was found guilty on the rape count, but was acquitted of rape while armed and of assault with a dangerous weapon. He was sentenced by Judge Pratt on February 11, 1971, to a term of four to twelve years. This appeal followed.

Miss Virginia Barr visited with her grandmother at 2213 First Street, Northwest, on September 2, 1969. She left the house at about 11:30 p.m. and walked down to the intersection of First Street and Rhode Island Avenue, Northwest, to hail a cab for the trip back to her own home in Southeast Washington. After she had been at the corner for a few moments, appellant pulled up in a car and offered her a ride. Miss Barr had seen him around her grandmother's neighborhood several times before, but she did not know his name. Appellant inquired who she was and told her that he had seen her around the First Street area. Miss Barr identified herself and told appellant she was about to get a cab. Appellant offered to take her home, and Miss Barr, after some hesitation, got into his car because he was persistent and also because she had seen him before. Once she was in the car, appellant introduced himself as "Reds" (Tr. 53-58). He drove up First Street and then turned west in the direction of Freedmen's Hospital. Miss Barr protested that he was going the wrong way to get to Southeast, but appellant insisted that he knew a short cut (Tr. 58-60). By this time he was driving so fast that she could not get out of the car (Tr. 60). Finally, appellant pulled into an alley off Newton Street, stopped the car and told Miss Barr ominously, "You know what you're here for . . . I want you to cooperate with me." (Tr. 58-61.) She started to cry and asked to get out of the car, but appellant grabbed her around the neck and slapped her twice. He produced a knife and told her, "You don't want to get hurt so you had better cooperate with me." (Tr. 62-63, 99.) They struggled, and appellant managed to throw her over into the back seat. He jumped out the front door and into the rear seat. Miss Barr continued to struggle with him, but appellant overpowered her and pulled off her skirt and panties (Tr. 63-64). He lay on top of her and had intercourse with her for about fifteen or twenty minutes until he ejaculated inside her (Tr. 63-66). Miss Barr, still crying, begged once more to get out of the car, but appellant refused to let her go. Finally, however, after he got himself to-

gether, he drove her to the corner of Fourth and U Streets, Northwest, where he forced her to get out of the car and ordered her to walk around the corner, threatening to shoot her if she disobeyed (Tr. 66-67).

Miss Barr walked as far as the corner and then broke and ran to Fourth and T Streets because she knew "that Mayor Washington lives at Fourth and T, and there is always an officer, you know, sitting around in front of his house" (Tr. 72). Finding Officer Larry Milton in front of the mayor's residence, she ran up to him and reported to him that she had been raped. At trial Officer Milton recalled, "She was crying, shaking, very nervous. Her speech was trembly. She had trembling in her voice. Like I stated, she seemed to be on the verge of going into hysterics." (Tr. 116.) He turned her over to Officer Herbert Grainger, who responded to his call for assistance. Grainger likewise recalled that her clothes were slightly disarranged and that "she was very upset. She seemed like she had been crying. We tried to ask her questions and she was upset and unable to answer very clearly." (Tr. 118-119)

Miss Barr was taken to D.C. General Hospital for a medical examination (Tr. 77-78, 113-124). The examination revealed the presence of intact sperm in her vagina, indicating that she had had intercourse within the last seventy-two hours.[1] The examining physician, however, was unable to determine from what he observed whether Miss Barr had suffered forced intercourse (Tr. 150O-150P).

The next morning Miss Barr appeared at the Sex Squad office and gave the detectives there a full account of the events, including a description of appellant.[2] Later in the day, at about 6:00 p.m., when she was again near her grandmother's house, she saw appellant drive by in the

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[1] The examination at the hospital took place at about 3:20 a.m. (Tr. 123).

[2] Appellant was described as 5'5" or 5'6", 175 to 180 pounds, light-skined, with sandy hair, a large nose, sideburns and freckles Miss Barr remembered that he wore a green uniform with a red and white patch on the front (Tr. 79-80).

same car in which she had seen him the night before. She was able to see his face plainly. She jotted down the license number of the car and then called the information in to the Sex Squad (Tr. 79, 89-90, 105-110, 124-127). The license and vehicle were eventually traced to appellant (Tr. 127, 130-136; see Tr. 135-140A). He was arrested by a Sex Squad Detective on October 13 (Tr. 139A, 150T).

The government's case also included evidence of Miss Barr's identifications of appellant out of court. On October 12 she was unable to pick out appellant's photograph from a group of nine set out before her at the Sex Squad. However, on October 21 she was able to select his picture from a group of forty-seven photographs, and on November 6 she picked appellant out of a lineup (Tr. 80-89, 141-144 A).[3]

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[3] Prior to trial the court heard evidence on appellant's motion to suppress Miss Barr's in-court identification because of an allegedly suggestive photographic identification process. She testified that she had seen appellant in the neighborhood several times before the night of the rape, so that when he pulled up in the car, she recognized him as someone she had seen before. When she got in, appellant introduced himself as "Reds" (Tr. 7-8). In all, from the time appellant first picked her up until he took her to 4th and U Streets after the rape, she was with him for, in her estimate, thirty-three to forty-five minutes (Tr. 8, 10). The lighting on the street when appellant pulled up in the car was bright; in the car en route to and from the alley it was not as bright, but she could make out appellant's face. While they were parked, it was "light enough to see" (Tr. 7-9). The next day when appellant happened by in his car after Miss Barr had given her statement to the Sex Squad, she looked him in the face as well as jotting down his license number (Tr. 24-27).

On October 12, 1969, Detective Weisel spread out nine black and white police photographs on a table before Miss Barr and asked is she could recognize anyone. Included in this array was a twelve-year-old picture of appellant, but she was unable to make an identification (Tr. 11-12, 31-32, 38). On October 21 the detective showed her a book containing forty-seven color Polaroid photographs of men with whom the Sex Squad comes into contact as arrestees or suspects. Miss Barr looked the book over and, without any suggestion from Weisel, picked out appellant's photograph, which was the last one in the book (Tr. 12-14, 33-34). Finally, on November 6 she attended a lineup at the Robbery Squad and picked out appellant from the array (Tr. 16, 35).

Appellant testified that to the best of his recollection he was at home during the time Miss Barr was raped. He stated on cross-examination that he had no memory of anything that happened on September 2 and claimed that he had never seen Miss Barr until the day of his trial (Tr. 150T-150AA).

ARGUMENT

I. There was sufficient corroboration of both the *corpus delicti* of the rape and of appellant's identity as the perpetrator.

(Tr. 59, 79, 89-90, 109-110, 116, 120, 146, 148, 150O-150P, 150X)

Appellant's claim of insufficient corroboration of the *corpus delicti* and of his identity is unfounded. The prosecution's obligation to present corroborative evidence in sex cases may be satisfied by circumstantial evidence (as well as direct evidence) "which tend[s] to support the prosecutrix' story." *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633, 636 (1942), *cert. denied* 318 U.S. 776 (1943). *Accord, Carter* v. *United States*, 138 U.S. App. D.C. 349, 354, 427 F.2d 619, 624 (1970) ("proven circumstances which tend to support the complainant's story"); *United States* v. *Terry*, 137 U.S. App. D.C. 267, 270, 422 F.2d 704, 707 (1970) ("any evidence, outside of the complainant's testimony, which has probative value—any evidence which could convince the trier of fact that the crime was committed"); *United States* v. *(Mack) Bryant*, 137 U.S. App. D.C. 124, 128, 420 F.2d 1327, 1331 (1969) ("evidence, real or testimonial, of circumstances that tend to support the complainant's account"). It is of course beyond dispute that "[t]here can be no absolute test or concrete guidelines set down as to what constitutes corroboration in a rape case. Each case must be evaluated on its own merits." *Bailey* v. *United States*, 132 U.S. App. D.C. 82, 88, 405 F.2d 1352, 1358 (1968). This Court has recognized a considerable number and variety of circumstances which may be corrobo-

rative.[4] In this case there are four circumstances which, we maintain, sufficiently corroborate Miss Barr's testimony that she was raped.

The first of these is the promptness of her complaint. Literally minutes after the rape was completed, she ran up to Officer Milton and reported the attack to him. She repeated the story to Officer Grainger, who responded to the scene, and then gave the same information to a Sex Squad detective at the hospital within three hours after the rape (Tr. 114-117, 121-123). The next day she followed through by reporting to the Sex Squad office in the morning to give a full report (Tr. 79, 146, 148). Still later that same day, after leaving the Sex Squad, she saw appellant drive by on the street and promptly reported the license number of his car to the detective assigned to her case (Tr. 89-90, 109-110). The second bit of corroboration is the observation of Officer Grainger that her clothing was "disarranged slightly" (Tr. 120). Though this alone may not be sufficient to corroborate, it takes on a more positive character when considered together with other confirmatory evidence. Third, Miss Barr's emotional condition when she met the two officers strongly supports her story. Officer Milton, who first met her and was with her for about thirty minutes, stated that "she was crying, shaking, very nervous" and "seemed to be on the verge of going into hysterics" (Tr. 116). Officer Grainger, who arrived a short time later, observed that she was still very much upset and unable to answer his questions clearly (Tr. 118-119). Finally, and most importantly, the medical examinations showed intact sperm in her vagina, indicative of intercourse within the preceding seventy-two hours (Tr. 150O-150P).[5]

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[4] *See United States* v. *Terry, supra,* 137 U.S. App. D.C. at 271, 422 F.2d at 708, commenting on *Allison* v. *United States,* 133 U.S. App. D.C. 159, 162 n.8, 409 F.2d 445, 448 n.8 (1969); *cf. Borum* v. *United States,* 133 U.S. App. D.C. 147, 409 F.2d 433 (1967), *cert. denied,* 395 U.S. 916 (1969).

[5] Appellant points to the fact that the examining doctor was unable to find conclusive physical indications of forced intercourse, and asserts that the medical evidence as a whole was "minimal"

Regarding corroboration of identity, we note initially that a lesser quantum of proof is required than for corroboration of the *corpus delicti*. *United States* v. *Jenkins*, —— U.S. App. D.C. ——, 436 F.2d 140 (1970); *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964). Indeed, in circumstances such as in this case, a "convincing identification by the complaining witness based on adequate opportunity to observe need not be further corroborated." *Franklin*, *supra*, 117 U.S. App. D.C. at 335, 330 F.2d at 209; *see Thomas* v. *United States*, 128 U.S. App. D.C. 233, 387 F.2d 191 (1967). In this case Miss Barr surely had an adequate opportunity to observe: she was with appellant for at least half an hour during her ordeal and was able to make out his facial features throughout. In addition, she had known appellant previously from seeing him around the neighborhood, and appellant introduced himself by a nickname ("Reds") which he himself acknowledged at trial (Tr. 59; 150X). She saw him the next day and told the police (Tr. 89-90, 105-110). She also was able to identify him freely from photographs and later at a lineup (Tr. 80-89, 141-144A). Finally, the distinctive green uniform with the red and white patch, which Miss Barr claimed he wore, was identified at trial by his work supervisor as being similar to that worn by appellant at his place of employment (Tr. 79, 150G-150I, 150S). All of these pieces of evidence, taken together, firmly corroborate appellant's identity as the rapist.

(Brief for appellant at 7). The answer to this assertion lies partly in the fact that, as Miss Barr candidly testified, she had had sexual relations with one John Carrington sometime prior to the day she was raped (Tr. 54-55). Obviously, physical indications of forced intercourse would be less apparent in a sexually experienced woman. Appellant, however, can draw no benefit from the fact of Miss Barr's prior relations with Carrington and the intact sperm. The medical evidence indicated that the sperm was no more than seventy-two hours old, and Miss Barr testified that she had not had sexual relations with Carrington for about a month previous to September 3 (Tr. 54).

II. Appellant's other claims of error are without merit.

(Tr. 11-16, 31-35, 38, 68-70, 80-90, 104-105, 129-130, 141-144A)

The other contentions advanced by appellant in our estimation deserve only summary comment.

A. There was no undue suggestivity in the out-of-court identifications.

Appellant finds suggestivity "self-evident" in (1) the fact that his picture was displayed last in a book of forty-seven shown to Miss Barr and (2) the fact that the book purportedly contained photographs of men thirty-nine years of age and older, when he was only thirty-one at the time.[6] It is hard to conceive how the fact that he was placed last could be prejudicial, especially in the absence of any inquiry into this fact by trial counsel or the court, both of whom were able to examine the book and no doubt would have pursued the matter if it bore indications of suggestivity (Tr. 142-143). The age differential was noticed by the court and counsel, but all apparently accepted without dispute the observation of the prosecutor that "the defendant looks forty years old" (Tr. 143). This, we submit, vitiates any claim of suggestivity.

Moreover, Miss Barr knew appellant by face even before the rape. At the time of the crime she was able to see him for a substantial period of time. She gave a detailed description of her assailant to the police within twelve hours of the rape and recognized him spontaneously on the street the next day.[7] Further, the record is bare of any indication that the police suggested to her whom to select either during the two photographic viewings or at the lineup. (See Tr. 80-89, 141-144A; see also Tr. 11-

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[6] Brief for appellant at 9-10.

[7] The fact that the license number and car description she phoned in to the police eventually led them to appellant—whom she later identified in a lineup—corroborates her ability to make a spontaneous identification, untainted by the photographic identification.

16, 31-35, 38.)[8] In all these circumstances there can be no cognizable claim of error arising from the photographic identification. *See United States* v. *Randolph*, D.C. Cir. No. 23,222, decided December 22, 1970; *cf. United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 19, 1971.

B. *The failure of the police to obtain certain items of the complainant's clothing did not deprive appellant of due process.*

At trial Detective Bryant testified that he wanted to obtain Miss Barr's clothing from her at the time she was examined at the hospital on the night of the rape. However, since the police, he testified, "were unable to obtain any clothing for her to wear away from the hospital . . . [s]he was instructed to bring the clothing with her the next day or two when she came in for a statement" (Tr. 129). Miss Barr never brought her clothing to the police and in fact denied that they had ever asked her to preserve or turn over her clothing. About a week after the rape, she recalled, she threw away her skirt, blouse and

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[8] At trial defense counsel objected to the photographic identification made on October 21 on the grounds that *United States* v. *Wade*, 388 U.S. 218 (1967), required that counsel be present. She pointed out that counsel assigned to appellant probably was present in police headquarters for a lineup (in which appellant did not participate because of a mixup) but was not asked to be present when Detective Weisel showed Miss Barr a book of photographs. (See Tr. 68-70; note 3, *supra*.) The trial judge's rejection of this argument (Tr. 70) is not assigned as error on this appeal. We feel obligated nevertheless to point out that this and other circuits have consistently declined to recognize the existence of any right to counsel at photographic identifications conducted even after arrest. *See, e.g., United States* v. *Meachum*, D.C. Cir. No. 24,109, decided June 8, 1971 (affirmed without opinion); *United States* v. *Brown*, D.C. Cir. No. 24,452, decided March 15, 1971 (*en banc*) (opinions to follow); *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *Allen* v. *Rhay*, 431 F.2d 1160 (9th Cir. 1970); *McGee* v. *United States*, 402 F.2d 434 (10th Cir. 1968).

underpants (Tr. 90, 104-105, 129-130).[9] Relying on this Court's decision in *United States* v. *(Carlton) Bryant*, —— U.S. App. D.C. ——, 439 F.2d 642 (1971), appellant claims reversible error in this sequence of events, arguing that it reveals a failure to "preserve" essential evidence. This argument is misguided.

In the first place, the testimony of Detective Bryant, if credited over Miss Barr's on this point, shows that the police took reasonable steps to obtain her clothes. The fact that she eventually threw them away, against the detective's commands, can hardly redound against the police or the prosecution. Further, even if the police negligently failed to collect these items, this case is outside the ambit of the *Bryant* decision. *Bryant* dwells on the problem of the intentional nonpreservation of evidence which has been recovered by law enforcement officials. Nothing in the *Bryant* opinion requires the police to "preserve" items, like the clothing here, which they have never obtained. As the Court stated, the "duty of disclosure attaches in some form [as a "duty of preservation"] *once the government has first gathered and taken possession of the evidence in question.*" —— U.S. App. D.C. at ——, 439 F.2d at 651 (emphasis added). Manifestly this duty did not rest on the police here because Miss Barr simply never gave them an opportunity to acquire the evidence. In addition, the rule in the *Bryant* case, which was decided January 29, 1971, should have no application to this case, tried on December 14-15, 1970, for its holding is purely prospective. *Id.* at —, 439 F.2d at 652.

In any case, we are hard put to appreciate how appellant's situation at trial was damaged by the failure to have Miss Barr's clothing in court. The fact that such evidence, a frequent type of corroborative evidence in rape prosecutions, was absent surely damaged the prosecution's case rather than that of the defense. The jury might reasonably expect such evidence to be brought forth.

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[9] The back and side of the blouse were soiled by grease, and a buttonhole on the skirt was torn (Tr. 104-105).

Considering the conflicting explanations given by Miss Barr and Detective Bryant, defense counsel might surely be expected to ask the jury to infer (1) that she was not a credible witness and (2) that the clothing would not corroborate her story of rape. The less evidence the prosecution produced, the stronger appellant's chance for acquittal became. The jury found him guilty in spite of, not because of, the missing garments.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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